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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ROBERT NITULESCU, Defendant and Appellant.	G045221 (Super. Ct. No. 08NF0420) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James P. Marion, Judge. Affirmed.

Siri Shetty, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Senior Assistant Attorney General, Barry Carlton and Karl T. Terp, Deputy Attorneys General, for Plaintiff and Respondent.

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I. INTRODUCTION

Five gang members – Risky, Grumpy, Stretch, Creeper and Ghost – carjacked a Ford Explorer around four in the morning from a car wash in Buena Park. Each of the five kicked the owner as he screamed for help. About a year and one-half later, police arrested appellant Robert Nitulescu, yclept Ghost. Nitulescu was subsequently convicted of carjacking, second-degree robbery, aggravated assault, and active participation in a criminal street gang. He was sentenced to 15 years to life, the life sentence being the result of the carjacking having been done in association with a criminal street gang. (See Pen. Code, § 186.22, subd. (b)(4)(B).)[1]

On appeal, Nitulescu's main target is the reason behind the life sentence. He argues the evidence is too thin to show the carjacking had a gang purpose. There was no evidence, he points out, the five gang members identified themselves as gang members, wore gang clothes, made gang signs at the time, or even that the carjacking occurred in territory claimed by the gang involved, the Southside Brown Demons (Brown Demons).

But Nitulescu's crimes fit squarely within section 186.22, subdivision (b)(1), because five gang members acted in reliance on their common gang "apparatus." (See generally *People v. Albillar* (2010) 51 Cal.4th 47, 60 (*Albillar*.)) In particular, the circumstances of the carjacking showed an efficient division of labor that would not have been exhibited but for five gang members acting in concert *as a gang*. Nitulescu's other arguments merely show the most harmless of errors (one question to an expert witness called for the expert to give a legal conclusion wholly obvious from the evidence anyway) or dash themselves against the rock of stare decisis. We affirm.

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[1] All further statutory references are also to the Penal Code.

II. FACTS[2]

A. *The Brown Demons*

The Brown Demons got their start in the 1990's as a "party crew" known as "BBOY Dimensions" or "Break Dance crew." A "party crew" has been defined as "a group of people who get together and have a common name like a gang, but usually intend to just go out and party, meet women, drink, and have a good time." (See *Pena v. Tilton* (N.D. Cal., No. C 07–2119 PJH., Nov. 30, 2010) [nonpub. opn.] (*Tilton*) [referencing gang expert testimony].)

The initials BD (as in break dance) would follow the group through their devolution from party crew to criminal street gang. In the early 2000's the group became a tagging crew,[3] and the "BD" morphed into shorthand for Brain Damage. The new brand, however, was ill-received among "influential" members of the Orange County gang culture. The influential members thought no self-respecting gang should call itself brain damaged. Accordingly, members of Brain Damage received a "hard time" (the gang expert's words – he did not elaborate) when they were incarcerated. So, by 2004, Brain Damage was rebranded again, still keeping the BD theme, but now the letters stood for Brown Demons. The group added Southside or "SS,"[4] and mutated into a full-fledged gang intent on gaining respect in the gang culture through criminal activities such as carjacking and possessing firearms.[5]

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[2] Before we discuss the actual carjacking, we first detail the nature of the Brown Demons gang and Nitulescu's membership in it. Our statement of facts about the gang is mostly taken from the testimony of two police officers, one of whom was the police officer from Buena Park who arrested Nitulescu in 2008 about a year and a half after the carjacking. The other was an Anaheim police detective who we refer to as "the gang expert." His area of expertise is Anaheim gangs.

[3] The gang expert testified the distinction between a tagging crew and a gang is tagging crews confine their criminal activities to felony vandalism.

[4] Other appellations for the Brown Demons are "SSBD," "Varrio Southside Brown Demons," "BDX3" and "24."

[5] *Galvaldon v. Horel* (C.D. Cal. Jan. 13, 2009, No. SACV 07-750-R (OP)) [2009 WL 122573] [noting gang expert testimony that particular gang evolved from party crew to tagging crew to criminal street gang].)

Criminal street gangs have their own numerology. For example, Hispanic street gangs in California generally operate under the auspices of either the Mexican Mafia or the Nuestra Familia, with the Mexican Mafia exercising suzerainty over the area south of Bakersfield and the Nuestra Familia the area to the north. Accordingly, since M is the 13th letter of the alphabet, "13" stands for the Mexican Mafia and often shows up in gang tattoos and other symbology.[6] Specific to the Brown Demons, "24" is emblematic, since B is the second letter of the alphabet, and D the fourth.

Gangs also have a tendency to identify with their home city. The Brown Demons is an Anaheim gang, and identifies with the city. Its gang colors are blue and black.

Southern California gangs can also have allies and rivals within the big tent of the Mexican Mafia. The Brown Demons are not only allied with another Anaheim gang, known as Folks, but also with a Los Angeles gang known as Clarence Street. The archenemy of the Brown Demons is a gang known as Jeffrey Street. The Brown Demons' contempt for Jeffrey Street was shown by Brown Demons' graffiti crossing out "JST" (for Jeffrey Street) with a nearby "187," signifying an intent to murder Jeffrey Street members.[7]

The Brown Demons is a "hybrid" or "non-traditional" gang (again, the gang expert's phrase), so while it follows "Hispanic traditions," and is associated with the slogan "Brown Pride," the gang is in fact integrated. It includes members who are black or white as well as Hispanic. Finally, as its name suggests and other evidence in this record would lead one to believe, the Brown Demons appear to have a tendency toward

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[6] Hence the "X3" in one of the permutations of the Brown Demons' name.

[7] Gang members often exhibit a familiarity with the sections of the Penal Code beyond that of many law school graduates.

the spectral in their gang monikers. "Ghost" fits perfectly among the Brown Demon gang nicknames.[8]

B. *Robert Nitulescu*

And monikers do not come cheap in the gang world. They must be earned. A gang moniker shows full-fledged membership in a gang, and membership in a gang is for life. (The jury heard the common phrase, "blood in, blood out," to describe the Faustian bargain inherent in joining a gang.) Monikers will not appear in the graffiti put up by a gang unless that member is in good standing.

Monikers also serve, like code names in spy stories, the purpose of hiding the true identities of the members. Gang members may know each other only by their moniker. Accordingly, generally speaking, gang members only go by one moniker.

Nitulescu had once admitted to a police officer he was known as Ghost. And one of the carjackers, the driver Creeper, would later identify a picture of Nitulescu as the "Ghost" he was with on the morning of the carjacking. Indeed, on the very morning of the carjacking, new graffiti appeared on an apartment in the heart of Brown Demon territory, graffiti which featured Nitulescu's moniker of Ghost.

Like monikers, gang tattoos must be earned. Gangs will punish those who wear a gang tattoo without the necessary credentials. As we have already noted, the Brown Demons is an Anaheim gang. Gang tattoos often include the home city or county of the gang. Nitulescu has "AHM," for Anaheim, tattooed on his hand.

The gang symbol for time in the Orange County jail is a star, because of its resemblance to the leafs from the stem of an orange. The star serves as a kind of perverse

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[8] When one of the five gang members who participated in the carjacking, Samuel Jajo or "Grumpy" was arrested, his cell phone was found with these gang monikers on it: angel, demon, ghost, mouse, rock and stretch There was testimony from another gang member, Edwin Santana, which equated "Ghost" with a Brown Demon member named "Casper," but other evidence (the gang expert's testimony that gang members only go by one moniker) would suggest "Casper" was a different member altogether from "Ghost." We should note here the name "Stretch" was used in a Casper the Ghost movie (Stretch is another, less friendly, denizen of the otherworld), while the name Creeper was used for a demon in the movie Jeepers Creepers.

combat ribbon for having served time in the Orange County jail. Nitulescu has a star tattooed on his left arm.

Nitulescu was also shown to have been in contact with Brown Demon members in a number of incidents that came up on law enforcement radar in the two years prior to the carjacking. In 2004, Nitulescu was present at a gang fight at a fast food restaurant along with a Brown Demon member named Robert Vasquez. In 2005, Nitulescu was detained along with Marvin Martinez (Stretch), after a fight in a park in Anaheim. In 2006, Nitulescu was stopped while driving in the territory of a rival gang. He was in the company of a Brown Demons member named Scrappy, and a shotgun was found in the car.

In short, there was ample evidence that on November 9, 2006, Nitulescu was an accepted member of the Brown Demons.

C. *The Crime*[9]

There was also substantial evidence the four other persons who were in the same tan, mid-1990's Honda Accord with Nitulescu on the morning of November 9, 2006, were also gang members – three of them members of the Brown Demons and one a member of Clarence Street, a Brown Demon ally in Los Angeles.

The driver of the car was a young, 17-year-old Brown Demon member named Raymond Murgo (Creeper). Besides Nitulescu, the car included Brown Demons members Marvin Martinez (Stretch) and Samuel Jajo (Grumpy), and Clarence Street member Edwin Santana (Risky). Around three that morning, the five gang members were, as Murgo testified, in a tan Honda, "driving around listening to music."

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[9] Most of the evidence concerning the carjacking came from the victim himself, but some came from the young driver of the gang car, Raymond Murgo (Creeper) and another participant, Edwin Santana (Risky). Being the driver, Murgo was arrested the same morning as the crime when his four compatriots got out of the car and fled. Santana appears to have testified under compulsion of a subpoena. A number of consistent elements emerge when their testimony is considered together. The gang expert filled in the profile by opining about the gang affiliation of each of the participants.

The car turned into a gas station at the corner of Knott and Crescent in Buena Park. The victim was getting ready for work, and cleaning his Ford Explorer for his commute to Los Angeles in a nearby car wash. Two men approached the victim, one with a gun. The victim was in the backseat at the time, but his keys were still in the ignition so he could listen to music. The victim tried to grab the keys and to run to the office of the gas station, but was punched. The next thing he knew, the tan Honda pulled up, and three more males (as the victim recounted events) got out and started punching him. The victim ended up on the ground. All five males started kicking him, perhaps as many as 40 or 50 times, including a number of blows to his head. As driver Murgo would later testify, Ghost and Santana drove away in the Ford Explorer.

The victim had two cell phones; the expensive one was taken (along with his wallet and car keys), but the victim found his second cell phone and called 911. By that time the Explorer and the Honda were both heading north on Knott. Ghost and Santana dumped the Ford Explorer just a few blocks away, then got back into the Honda.

On the drive back to their home territory in west Anaheim, however, the Honda was stopped by police. Murgo's four compatriots ran, leaving him behind.[10] Later that morning *new* Brown Demons graffiti appeared on an Anaheim apartment complex in the "heart" of Brown Demons territory. The graffiti highlighted the moniker Ghost and had a "V" symbol (for "varrio") indicating the territory was claimed by the Brown Demons.

III. DISCUSSION

A. *The Gang Offense and Enhancements*

We may summarily dispose of Nitulescu's pro forma argument that there was insufficient evidence of his awareness of the Brown Demon's pattern of criminal activity to convict him of active participation in a criminal street gang under section

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[10] Murgo would later make a deal for a reduced sentence to testify.

186.22, subdivision (a). Nitulescu: (1) sported tattoos associated with the Brown Demons; (2) was physically present for at least two fights involving Brown Demons members, one in 2004 and the other in 2005; (3) was found driving with a shotgun in the territory of a rival gang in 2006; (4) had his gang moniker smeared on an apartment on the very morning of a carjacking in which (5) he was a full participant. From this evidence a jury could easily and reasonably infer he had an awareness the Brown Demons engaged in battery, firearm possession, vandalism and carjacking.

The more complex question involves the effect of section 186.22, subdivision (b)(1) on the carjacking. Nitulescu argues the record will not support the gang expert's opinion the offenses were "gang related."

Preliminarily, we must note that "gang relatedness" is not its own independent element in addition to what is spelled out in the text of the section 186.22, subdivision (b)(1). The statute itself consists of only two operative elements: (1) "committed for the benefit of, at the direction of, or in association with any criminal street gang," and (2) "with the specific intent to promote, further, or assist in any criminal conduct by gang members."[11] It is enough that a crime be committed *in association with*

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[11] In pertinent part, section 186.22, subdivision (b)(1) provides: "Except as provided in paragraphs (4) and (5), any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows: . . . ."

Paragraphs (4) and (5) then provide:

"(4) Any person who is convicted of a felony enumerated in this paragraph committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, be sentenced to an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of:

"(A) The term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 3046, if the felony is any of the offenses enumerated in subparagraph (B) or (C) of this paragraph.

"(B) Imprisonment in the state prison for 15 years, if the felony is a home invasion robbery, in violation of subparagraph (A) of paragraph (1) of subdivision (a) of Section 213; carjacking, as defined in Section 215; a felony violation of Section 246; or a violation of Section 12022.55.

"(C) Imprisonment in the state prison for seven years, if the felony is extortion, as defined in Section 519; or threats to victims and witnesses, as defined in Section 136.1.

a gang that assists criminal conduct by gang *members*. Gang relatedness, as shown by a careful reading of both *People v. Gardeley* (1997) 14 Cal.4th 605, 622 (*Gardeley*) and *Albillar, supra*, 51 Cal.4th at page 60, is merely a convenient shorthand phrase encompassing the first operative element of the statute, i.e., "committed for the benefit of, at the direction of, or in association with any criminal street gang."[12]

Nitulescu's crimes here were undoubtedly done in the exclusive company of fellow gang members. Each of the five were members of, or allies of, the Brown Demons. And, if one looks closely at the circumstances of the carjacking and compares them with the facts in *Albillar*, it is clear there was enough evidence to sustain the finding that Nitulescu's crimes were done in association with a gang.

"(5) Except as provided in paragraph (4), any person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life shall not be paroled until a minimum of 15 calendar years have been served."

[12] *Gardeley* arose out of an attack by members of the Crips on a victim who stopped to urinate in a carport of an apartment complex controlled by the gang. The main issue was whether the predicate offenses had to be gang related in order to establish the pattern of gang activity necessary to conclude a group is a criminal street gang. (See *Gardeley, supra*, 14 Cal.4th at p. 610.) The Court of Appeal had (erroneously it turned out) concluded that the predicate offenses indeed needed to be "gang related," and much of the Supreme Court's opinion was taken to demonstrating that gang relatedness is not a requirement for predicate offenses. (*Id*. at pp. 620-623.) In the context of that discussion, the *Gardeley* court had occasion to equate gang relatedness with the benefit-direction-association clause of section 186.22: "Here, the phrase 'for the benefit of, at the direction of, or in association with,' which defendants would have us read into subdivision (e) of section 186.22, appears in subdivision (b)(1) of section 186.22. The latter provision states that, under certain conditions, a felony conviction qualifies as a street gang crime and hence is subject to increased punishment. By inserting the italicized phrase in subdivision (b)(1), the Legislature made it clear that a criminal offense is subject to increased punishment under the STEP Act only if the crime is 'gang related,' *that is*, it must have been committed, in the words of the statute, 'for the benefit of, at the direction of, or in association with' a street gang." (*Id*. at p. 622, italics added, original italics deleted, fn. omitted.) The key words in that passage, for our purposes, are the transitional "that is," equating gang relatedness to the benefit-direction-association clause.

Some 13 years later, in one passage in the *Albillar* opinion, a quotation from *Gardeley* omitted the words after "that is." (See *Albillar, supra*, 51 Cal.4th at p. 60.) However, seven pages later, the *Albillar* court made it crystal clear that gang relatedness is simply a synonym for the benefit-direction-association prong in the statute and is not its own independent element: "A similar analysis disposes of the related argument, advanced by all three defendants, that section 186.22(b)(1) requires the specific intent to promote, further, or assist a gang-related crime. The enhancement already requires proof that the defendant commit a gang-related crime in the first prong – i.e., that the defendant be convicted of a felony committed for the benefit of, at the direction of, or in association with a criminal street gang. [Citation to *Gardeley, supra*, 14 Cal.4th at pp. 621-622.] *There is no further requirement that the defendant act with the specific intent to promote, further, or assist a gang*; the statute requires only the specific intent to promote, further, or assist criminal conduct by gang members." (*Albillar, supra*, 51 Cal.4th at p. 67, italics added, original italics deleted.)

Albillar involved a distinctly atypical gang crime – three members of the Southside Chiques gang-raped a teenager who was the friend of one gang members' girlfriends. (See *Albillar, supra,* 51 Cal. 4th at pp. 51-54.) The crime was so atypical an expert testified that, generally speaking, rape is "'frowned upon'" by Latino street gangs. (*Id*. at pp. 63-64.) On top of that, there was, as in the present case, no obvious indicia of gang purpose in the rape – no explicit gang identification, no gang signs, no gang colors, indeed no "gang reason" for the gang rape.

Even so, the *Albillar* majority held that common gang membership and the reliance on the gang "apparatus" was enough to establish the requisite gang relatedness for the "in association with" language of section 186.22, subdivision (b). (*Albillar, supra*, 51 Cal.4th at p. 60 ["The record supported a finding that defendants relied on their common gang membership and the apparatus of the gang in committing the sex offenses against Amanda M."].)

Under the *Albillar* test, there can be no question that Nitulescu's participation in the carjacking comes within section 186.22, subdivision (b). As in *Albillar*, where two gang members held the victim's legs down while the third member raped her (*Albillar, supra*, 51 Cal.4th at p. 61), the common gang membership allowed for an easy division of labor in the carjacking. Here, Nitulescu and Santana approached and distracted the victim as he was vacuuming his vehicle, but when he fought back, the other three came to Nitulescu's and Santana's aid. They all "worked together" to accomplish the crime. (See *id*. at p. 61 [noting expert testimony of the benefits of gang members working together]; see also *People v. Hunt* (2011) 196 Cal.App.4th 811, 815-816 (*Hunt*) [finding gang purpose in robbery of fast food restaurant facilitated by division of labor between gunman and getaway driver].)

Two other items of evidence strengthen the finding that Nitulescu's actions were "in association with" a gang in comparison to the facts in *Albillar*. First, Brown Demons graffiti, which among other things glorified Nitulescu's gang moniker of Ghost,

appeared on an apartment building in Brown Demons' territory on the very morning of the carjacking. A reasonable jury could link the two items, the inference being that the Brown Demons *qua* gang had decided to become particularly active on November 9, 2006, by showing its flag in the form of a major violent crime and then marking its territory by defacing an apartment complex.

Second was a revealing statement made by Murgo. When asked why he didn't come to the victim's aid, he candidly answered: "If I would have went to his aid, I probably wouldn't be here right now." Murgo's testimony shows the five were not acting as isolated individuals who just happened to decide to commit a crime at the same time, but were acting under a common gang discipline.

In contrast to the case at bar, *In re Daniel C.* (2011) 195 Cal.App.4th 1350, relied on by Nitulescu, is a perfect example of a crime *not* done in association with a gang – or even done in association with *any* gang members. In *Daniel C.*, three young men walked back and forth inside a supermarket, but then two left and one remained. The one who remained then picked up a whiskey bottle and tried to walk out of the store without paying for it. The lack of *any* assistance by the other gang members in the commission of the crime showed the absence of any gang-relatedness. (See *id*. at p. 1361; see also *In re Frank S*. (2006) 141 Cal.App.4th 1192 (*Frank S.*) [gang member found riding a bicycle by himself with concealed knife, bindle of methamphetamine and red banana held insufficient to show gang relatedness].) Here, by contrast, the three remaining members of the gang instantly provided reinforcements when the victim had the temerity to try to fight off the first wave of assailants.

B. *Ultimate Facts*

A witness, as seems obvious on first blush, cannot express an opinion on a defendant's guilt. (See *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 77 (*Coffman and Marlow*) ["A witness may not express an opinion on a defendant's guilt."]; *People v. Torres* (1995) 33 Cal.App.4th 37, 43 ["A Witness May Not Express Opinions on the

Definition of Crimes, Whether a Crime Has Been Committed, or the Defendant's Guilt."].)

A corollary is that an expert witness cannot testify a specific defendant had a specific intent to do a crime; the expert witness is not a mind-reader and his or her opinion on a specific defendant's intent is "no more competent" than the jury's own. (See *Coffman and Marlow, supra*, 34 Cal.4th at p. 77 ["'Rather, opinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact. To put it another way, the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt.'"].)

Two relatively clear examples of a gang expert crossing the line and opining on a specific defendant's intent or motive are found in *Frank S., supra,* 141 Cal.App.4th 1192 and *People v. Killebrew* (2002) 103 Cal.App.4th 644 (*Killebrew*). In *Frank S.*, a lone bicyclist was stopped and found to be carrying a concealed knife; a gang expert opined that the cyclist possessed the knife for the benefit of a street gang because he would need it for protection if assaulted by a rival gang. (*Frank S., supra,* 141 Cal.App.4th at pp. 1195-1196.) Nothing else but "weak inferences and hypotheticals" supported any "gang-related purpose for the knife." (*Id.* at p. 1199.) In *Killebrew,* a gang expert testified that when just one gang member in a car knows of a gun, every gang member in that car "constructively" possesses that gun. (*Killebrew, supra,* 103 Cal.App.4th at p. 652.) The *Killebrew* court reasoned the testimony went to the "knowledge and intent" of each of the occupants in the car, and thus effectively "did nothing more than inform the jury" how the expert thought the case should be decided; it was "an improper opinion on the ultimate issue." (*Id.* at p. 658.) Relying primarily on *Frank S.* and *Killebrew*, Nitulescu now fashions an attack on two opinions given by the gang expert here.

The first opinion was given in response to the direct question (not a hypothetical) of whether the expert had an opinion as to whether the Brown Demons "is

an actual criminal street gang within the meaning of the Penal Code and was a criminal street gang back in 2006." The expert answered, "Absolutely." The trial judge overruled the objection following on the heels of the answer.

We have found no case (nor have had one cited to us) which directly addresses the question of whether a gang expert can flatly testify a given group is a criminal street gang "within the meaning of the Penal Code." *Gardeley* appears to be the closest authority on the question, but it isn't quite close enough here to be dispositive. In *Gardeley*, the court impliedly put its imprimatur on the testimony of a gang expert which "provided much of *the evidence necessary*" for the jury to conclude that the Crips are indeed a criminal street gang, plus also directly opined the gang engaged in narcotics trafficking and witness intimidation. (*Gardeley, supra*, 14 Cal.4th at p. 619, italics added.) But the expert didn't testify the Crips were a criminal street gang "within the meaning of the Penal Code." Rather, the expert provided evidence from which the jury could reach its own conclusion as to whether the Crips were a criminal street gang.[13]

Nitulescu is correct the objection to the question of whether the expert had an opinion the Brown Demons constituted a criminal street gang *within the meaning of the Penal Code* should have been sustained. While subsequent case law has significantly restricted *Killebrew* (and by extension *Frank S.* to the degree it relied on *Killebrew*),[14] the

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[13] To be sure, declaring the obvious was hardly necessary in *Gardeley*. Some criminal street gangs are so well known in American popular culture – the Bloods and Crips in particular – that one could practically take judicial notice a group of people doing business under some variation of the name "Crips" constitute a criminal street gang.

[14] See *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1551 (*Mark Gonzalez*) [*Killebrew* does not preclude an expert from giving information "from which the jury" may infer motive or intent]; *People v. Gonzalez* (2006) 38 Cal.4th 932, 945-946 (*Jose Gonzalez*) [we read *Killebrew* as "merely" prohibiting opinion testimony about the defendant's knowledge or intent]; *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1512 (*Garcia*) [upholding expert testimony the defendant was an active participant in a particular Anaheim gang and possessed a gun for the benefit of the gang, and limiting *Killebrew* to direct testimony of the knowledge or intent of the defendant]; and most recently, *People v. Vang* (2011) 52 Cal.4th 1038, 1048-1049 (*Vang*) [disapproving *Killebrew* to the extent it condemned hypothetical questions put to an expert gang witness and explaining that the correct rationale for the *Killebrew* result was *not* that the expert testimony goes to the "'ultimate issue of fact'" but that such testimony simply offers "'no assistance to the trier of fact'" who is as competent as the witness on the ultimate issue of guilt].

rule remains that expert witnesses cannot testify to conclusions of law. (See *Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1017 ["Courts ordinarily do not consider an expert's testimony to the extent it constitutes a conclusion of law . . . ."]; *Morrow v. Los Angeles Unified School Dist.* (2007) 149 Cal.App.4th 1424, 1445 ["The manner in which the law should apply to particular facts is a legal question and is not subject to expert, much less lay, opinion."]; *Towns v. Davidson* (2007) 147 Cal.App.4th 461, 473 ["Plaintiff's expert added nothing beyond declaring the undisputed facts in his opinion constituted recklessness. . . . He reached what in this case was an ultimate conclusion of law, a point on which expert testimony is not allowed."]; *People v. Frederick* (2006) 142 Cal.App.4th 400, 412 ["The trial court also properly restricted Lindauer and other expert witnesses from instructing upon the law of endless chain schemes."]; *Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1178 ["There are limits to expert testimony, not the least of which is the prohibition against admission of an expert's opinion on a question of law."].)

Thus, *as framed*, the question about whether the Brown Demons constituted a criminal street gang "within the meaning of the Penal Code" crossed the line by inviting the gang expert to give a legal conclusion as to how the law should apply to the particular facts of this case.

That said, the error was about as harmless as harmless errors can be. There is no question the gang expert could testify as to the various elements which make up the definition of a criminal street gang under section 186.22, subdivision (f). He could testify the Brown Demons was an ongoing group of at least three persons. He could testify its primary activities included felony vandalism and carjacking. He could testify to the group's common name and identifying symbols. This was, in short, a case where the expert connected the dots and the connections drew an unmistakable picture. The only error was allowing the gang expert to hang a legal title on that picture.

The analysis is different as regards the second question, however. Here, the expert did not cross the line.

The second opinion was given in response to the direct question (again, not in hypothetical form) as to whether the "actions of those four gang members" – Murgo, Santana, Jajo and Martinez – "specifically promoted and furthered criminal conduct by gang members." (Nitulescu himself was conspicuously not part of the question.) The expert answered yes. The next question was, "How does it do that?" Nitulescu's trial counsel immediately objected, the court overruled the objection, but quickly admonished the jury "It's his opinion. It's up to you to agree or not, okay, ladies and gentlemen." The expert then explained the reason was the cultivation of "respect" among gang members and within the community by causing "fear and intimidation."

The gang expert was *not* asked about the subjective motivations of Murgo, Jajo, Santana, and Martinez. (Cf. *Vang*, *supra*, 52 Cal.4th at p. 1048.) To be precise, he was asked whether the *actions* of four specific gang members had the objective effect of "further[ing] criminal conduct by gang members." That question wasn't even the target of an objection. Then, when asked *how* the "actions" furthered criminal conduct by gang members (to which there was an objection), the expert opined the actions promoted respect among fellow gang members and inculcated fear among local citizens. Strictly speaking, the subjective motivations of the four specific individuals was not the topic of the objected-to question. The objective effect of their actions was.

Moreover, even any arguable error was clearly harmless. Murgo, Jajo and Martinez were all members of the same gang as Nitulescu; Santana was a member of an allied gang. Nitulescu admitted he was best friends with Martinez when arrested. The Brown Demons surfaced with a vengeance on the morning of November 9, 2006. Not only did four of its members commit a carjacking, but fresh Brown Demons graffiti was sprayed on an apartment building – graffiti which advertised Nitulescu's good standing in the gang via his moniker Ghost, and Ghost was clearly shown to be one of the carjackers.

Murgo testified he didn't dare summon help for the victim, because he would be the object of retaliation, thus establishing the existence of a regime of gang discipline governing the carjacking operation. Again, the gang expert connected the dots – it was an easy task for the jury to title the picture.

C. *Testimonial "Hearsay"*

A gang expert is a kind of practical field anthropologist, whose primary source material comes directly from real, live gang members. (See *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1370 (*Olguin*) [noting there was sufficient foundation for gang expert's opinion]; see also *People v. Hill* (2011) 191 Cal.App.4th 1104, 1119 (*Hill*) [noting gang expert spent 90 percent of his time investigating certain street gangs, including interviews of gang members, community members, as well as continually monitoring gang activity].) This field work necessarily involves much personal contact and listening to what gang members say. (*Olguin, supra*, 31 Cal.App.4th at p. 1370.)

Personal contact, however, often means a gang expert must rely disproportionately on out-of-court statements taken from gang members for his or her opinions rather than, say, a reading list of academic papers about gang sociology. (E.g., *Hill, supra,* 191 Cal.App.4th at pp. 1122-1123.)

The question thus arises as to whether the jury's hearing such statements somehow contravenes the Sixth Amendment's confrontation clause. (See *Crawford v. Washington* (2004) 541 U.S. 36, 44 [noting Walter Raleigh's demand: "'let Cobham be here, let him speak it. Call my accuser before my face . . . .'"].) The answer turns on whether the statements are "testimonial" in nature – if so, the confrontation clause does not permit the statement into evidence. (*Id.* at p. 59.) Otherwise, the confrontation clause is not offended.

The test for whether a statement is "testimonial" is whether the statement was elicited as part of an interrogation, "the *primary purpose*" of which was "to establish facts to be used against the perpetrator." (*People v. Nelson* (2010) 190 Cal.App.4th 1453,

1468, italics in original.) Here, Nitulescu identifies, with appropriate record references, only three statements made by gang members to the gang expert which were later relayed to the jury.[15] And he makes no attempt to demonstrate any of these statements were the result of interrogations *directed* at obtaining facts to be against Nitulescu. We would note that it is, in fact, a reasonable inference those statements were *not* elicited from interrogations directed at Nitulescu because Nitulescu was arrested in July 2008, more than a year and a half later than his fellow gang members.

But in any event, as Nitulescu concedes, stare decisis is against him. He concedes *People v. Thomas* (2005) 130 Cal.App.4th 1202 (*Thomas*) is directly against him. More importantly (for our purposes, see *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455) so is a case he doesn't mention in this context, *Gardeley, supra,* 14 Cal.4th 605. Both *Thomas* and *Gardeley* approved significant amounts of hearsay being put before the jury in the form of foundational testimony supporting an expert's opinion.[16]

To be sure, *Hill*, *supra*, 191 Cal.App.4th 1104, 1129-1137, has set forth a formal critique of the rule in *Gardeley* and *Thomas*. However, given that in this case Nitulescu makes no serious attempt to demonstrate testimoniality under *Crawford*, there is no particular reason in this opinion to critique the critique. It is enough to say *Hill* recognized the current state of the law under *Gardeley* and followed it, even to the point of ruling there was no constitutional violation for the expert to have expressed "his

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[15] The only statements backed up by record references (as distinct from generalities) are: (1) a gang member told the expert he was "jumped in" (initiation by beating) by Brown Demon members for 24 seconds because of the 2 – 4 correlation to the gang (the letters B and D); (2) a gang member told the expert the number of members in November 2006; and (3) the expert had reviewed "documents from the other co-defendants in this case" which showed they had admitted they Brown Demons had "actually" benefited from the carjacking.

[16] In *Thomas*, the expert testified to, among other things, an "incident report" showing the defendant had been present at a gang knife fight in 1995 and that during a search of the house of another gang member who was an attempted murder suspect, the officer found the defendant hiding in a concealed basement. (*Thomas, supra,* 130 Cal.App.4th at p. 1206.) In *Gardeley*, the gang expert's testimony included details of three previous criminal incidents related to the gang. (*Gardeley, supra,* 14 Cal.4th at p. 613.)

opinion regarding the thought processes and behavior of gang members." (*Hill, supra*, 191 Cal.App.4th at p. 1122.) The expert here expressed less. It was not an abuse of discretion to have allowed that, and similar evidence, in. (*Id*. at p. 1126; see also *id*. at pp. 1122-1126.)

D. *Discretion to Strike the Gang Allegation*

At sentencing, the trial judge invited argument on the question of whether he had the discretionary power to dismiss the gang allegation regarding the carjacking so as to spare Nitulescu a 15-year-to-life indeterminate sentence under section 186.22, subdivision (b)(4). Having been persuaded he had no discretion in that regard, the judge handed down the life sentence. Nitulescu's final argument is that the trial judge had discretion he didn't know he had – pursuant to either section 186.22, subdivision (g), section 1385, or both – so the case should be remanded for the judge to consider whether to exercise that discretion.[17]

Some wheels need not be reinvented. The issue of a trial judge's discretion, or lack thereof, to strike a gang allegation to spare a defendant the otherwise inexorable result of section 186.22, subdivision (b)(4) has already been thoroughly (and in detail and cogently) considered in *People v. Campos* (2011) 196 Cal.App.4th 438 (*Campos*), and the answer is not the one Nitulescu advocates.

First, *Campos* shows that section 186.22, subdivision (g) applies only to *enhancements*, but the penalty prescribed by section 186.22, subdivision (b)(4) is not a gang "enhancement" at all – it is an *alternate penalty*. (See *Campos, supra*, 196 Cal.App.4th at pp. 448-450.)[18] Whatever discretion section 186.22, subdivision (g)

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[17] Section 186.22, subdivision (g) gives trial courts discretion to strike additional punishment for enhancements in the interests of justice. Section 1385 is a general statute giving trial courts authority to dismiss criminal cases in the interests of justice. In *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*) the court held section 1385 gave trial courts authority to strike a prior conviction for purposes of the Three Strikes Law.

[18] While the focus of *Campos* was on section 186.22, subdivision (b)(5) case, and the focus here is on section 186.22, subdivision (b)(4)(B) [carjacking done on behalf of a gang], it makes no difference. Section 186.22, subdivisions (b)(4) and (b)(5) are treated identically. Section 186.22, subdivision (b)(1) opens with:

otherwise might afford a judge as regards *enhancements*, that discretion does not apply to the penalty provisions of section 186.22, subdivision (b)(4) or subdivision (b)(5).[19]

Second, *Campos* shows section 1385 has been, as regard to gang allegations, trumped by section 186.22, subdivision (g), which itself does not contemplate application to section 186.22, subdivision (b)(1) at all. (See *Campos*, *supra*, 196 Cal.App.4th at pp. 450-454.)[20]

Nitulescu makes no attempt to meet *Campos* on its terms, or otherwise try to demonstrate why its reasoning may be faulty, except to suggest the distinction between an alternate penalty provision and an "enhancement" is a somewhat belated development in the criminal case law. Nitulescu seems to argue courts will one day come to their senses and conclude the enhancement-alternate penalty dichotomy was a mistake. As prophecy, however, the argument fails so far. A 2009 Supreme Court case, *People v. Jones* (2009) 47 Cal.4th 566, squarely holds section 186.22, subdivision (b)(4) to be a "penalty provision," that is, an "'*alternate*'" penalty for the underlying penalty when done to benefit (or at the direction of, or in association with) a gang. (*Jones*, *supra*, 47 Cal.4th at p. 576, and citing and quoting *People v. Jefferson* (1999) 21 Cal.4th 86, 101.)

There is, however, one outlier. *People v. Torres* (2008) 163 Cal.App.4th 1420 (*Torres*) contains language suggesting a trial court possesses the

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"Except as provided in *paragraphs (4) and (5)*, any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows . . . ." (Italics added.)

[19] Here is the text of section 186.22, subdivision (g): "Notwithstanding any other law, the court may strike the additional punishment *for the enhancements* provided in this section or refuse to impose the minimum jail sentence for misdemeanors in an unusual case where the interests of justice would best be served, if the court specifies on the record and enters into the minutes the circumstances indicating that the interests of justice would best be served by that disposition." (Italics added.)

[20] For a number of reasons, including: (1) the text of section 186.22, subdivision (g) (see *Campos, supra*, 196 Cal.App.4th at p. 452 [noting the "Notwithstanding any other law" clause]); (2) section 186.22, subdivision (g) being more specific than section 1385 (*Campos, supra*, 196 Cal.App.4th at p. 453); and (3) section 186.22, subdivision (g) having been enacted later in time than section 1385 – way later, as it turns out, 1988 versus 1850. (See *ibid*.)

authority to strike a section 186.22, subdivision (b)(4) penalty. The *Torres* court, however, did not have the benefit of the Supreme Court decision in *Jones*. Thus, as *Campos* would later note, *Torres* "inaccurately" referred to the section 186.22, subdivision (b)(4) penalty as a "'gang enhancement'" instead of as an alternate penalty.[21] (See *Campos*, *supra*, 196 Cal.App.4th at p. 449, fn. 8, quoting *Torres*, *supra*, 163 Cal.App.4th at pp. 1422, 1424, 1427, 1433.)

Moreover, *Torres* did not consider the actual language of section 186.22, subdivision (g) (see *Campos*, *supra*, 196 Cal.App.4th at p. 449, fn. 8), or ever directly address the scope of section 186.22, subdivision (g). (See *Torres*, *supra*, 163 Cal.App.4th at p. 1433, fn. 6 [assuming, but not demonstrating, trial court authority to strike gang enhancements].) Not surprisingly then, just as Nitulescu's briefing makes no attempt to show *Campos* to be an inaccurate statement of the law, it makes no attempt to demonstrate the persuasiveness of *Torres*.

The trial judge was right. He had no discretion to strike the section 186.22, subdivision (b)(4)(B) penalty.

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[21] In *Torres*, the statute was section 186.22, subdivision (b)(4)(C), for witness intimidation, while here we have section 186.22, subdivision (b)(4)(B), for carjacking. Again, given the structure of the statute, it makes no difference.

DISPOSITION

The judgment is affirmed.

BEDSWORTH, J.

WE CONCUR:

O’LEARY, P. J.

IKOLA, J.